

Immigration Practice Tips

Defense-Relevant Immigration News

By Marianne C. Yang of
NYSDA's Immigrant Defense Project (IDP)*

Counsel's Incorrect Advice About Deportation Issues May Allow Noncitizen Defendants To Seek Vacatures of Guilty Pleas

The New York Court of Appeals recently held that a defense attorney's affirmative misstatements to a non-citizen client on the immigration consequences of a guilty plea may, under certain circumstances, constitute ineffective assistance of counsel. *People v McDonald*, No. 110, (11/24/03) (acknowledging federal court cases ruling same, e.g., *US v Couto*, 311 F3d 179 [2d Cir. 2002] [noted in *Backup Center Report*, Vol. XVII, No. 6, Nov-Dec 2002, p. 18]). In *McDonald*, the petitioner, a Jamaican citizen who has lived in the US for more than 25 years as a lawful permanent resident, sought to withdraw his guilty plea to

N.B.: Address, Phone & Fax for the Immigrant Defense Project

We continue to receive letters, faxes, and phone calls at our old address. Please note that our new address, hotline phone number, and fax number are:

NYSDA Immigrant Defense Project
2 Washington Street, 7 North
New York, NY 10004
Hotline: (212) 898-4132
Fax: (212) 363-8533

felony drug sale and possession charges on the ground that he received ineffective assistance of counsel. His defense attorney had incorrectly advised him that conviction would not result in deportation because he was a long-term US resident and his children were American citizens by birth and living in the United States.

The Court of Appeals held that this type of affirmative misrepresentation by defense counsel falls below an objective standard of reasonableness and constitutes deficient performance. However, the Court denied Mr. McDonald relief after finding that the factual allegations in his motion to vacate judgment did not make out a *prima facie* showing of prejudice. The factual allegations "merely"

*Marianne C. Yang is Acting Director of NYSDA's Immigrant Defense Project (see p. 2). The IDP provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the IDP on Tuesdays and Thursdays from 1:30 to 4:30 p.m. at (212) 898-4132.

stated that counsel misinformed the defendant as to the deportation consequences of his guilty plea and that the defendant relied on that incorrect advice in entering his plea. Defense practitioners should be aware that to succeed on an ineffective assistance of counsel claim, the defendant must also specifically allege that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (citing *Hill v Lockhart*, 474 US 52, 56 [1985]).

In light of the Court of Appeals ruling, Mr. McDonald brought a new Article 440.10 motion that included the required allegations and, after a hearing before the trial judge, ultimately prevailed in having his pleas vacated.

McDonald leaves undisturbed the Court of Appeals' 1994 ruling that a counsel's "mere" failure to advise a defendant of the deportation consequences of a guilty plea does not, *per se*, constitute ineffective assistance of counsel. See *People v Ford*, 86 NY2d 397 (1994).

For more information, see *Backup Center REPORT*, Vol. VXIII, No. 5, Oct-Nov-Dec 2003, pp. 3, 12, and 13.

BIA Issues Decision that Increases Likelihood Certain NY Crimes Will Be Deemed A "Crime of Violence" For Immigration Purposes

The Board of Immigration Appeals (BIA) recently ruled that a conviction under subsections 1 or 2 of New York's first-degree manslaughter statute (Penal Law 125.20) is a "crime of violence" and therefore an "aggravated felony" for immigration purposes. *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004).

Vargas-Sarmiento increases the possibility that convictions for some other New York State felony offenses (for example, certain felony assault offenses) will also be deemed aggravated felonies. See INA 101(a)(43)(F) ("aggravated felony" definition includes a "crime of violence" with a prison sentence of at least one year). Conviction of an aggravated felony generally results in mandatory deportation of noncitizens from the United States.

The decision also increases the possibility that some New York felony convictions arising from domestic violence situations will trigger the separate "crime of domestic violence" ground of deportability. See INA 237(a)(2)(E) ("crime of domestic violence" is defined as a "crime of violence" against certain protected persons, including but not limited to current or former spouses).

For immigration purposes, a "crime of violence" is defined as: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 USC 16.

The 2nd Circuit last year held that a conviction under New York's second-degree manslaughter statute (Penal Law 125.15[1] ["recklessly causes the death of another person"]) does not fall under the second prong of the above definition of "crime of violence". See *Jobson v Ashcroft*, 326 F3d 367 (2nd Cir. 2003) (interpreting that second prong to require that an offense pose a substantial risk that a defendant will use physical force, and that the risk is of an intentional use of that force). Applying a categorical approach, the *Jobson* Court held that the minimum conduct necessary to violate the second-degree manslaughter statute is not "by its nature" a crime of violence because (1) the risk that a defendant will use physical force in the commission of an offense is materially different from the risk that an offense will result in physical injury, and the state statute requires only the latter (passive conduct or omissions alone are sufficient for a conviction) and (2) an unintentional accident caused by mere recklessness, which would sustain a conviction under the state statute, cannot properly be said to involve a substantial risk that a defendant will use physical force.

Ruling that subsections 1 and 2 of first-degree manslaughter fall under the second prong of the "crime of violence" definition despite *Jobson*, the BIA distinguished the second-degree manslaughter statute addressed in *Jobson* as one that required a *mens rea* of recklessness only. The BIA reasoned that because subsections 1 and 2 of first-degree manslaughter require proof of intent to cause serious physical injury to or death of another person and that the defendant succeeds in causing such injury or death, it is likely that the defendant will be required to engage in affirmative conduct (citing *Chery v Ashcroft*, 347 F3d 404 [2nd Cir. 2003] [distinguishing *Jobson* in holding that conviction for Connecticut second-degree sexual assault is a "crime of violence" because it requires affirmative conduct by the defendant, namely sexual intercourse]). The BIA further reasoned that the crime *by its nature* involves a substantial risk that such conduct may involve the intentional use of force, even though force may not be present in all circumstances (citing *Dickson v Ashcroft*, 346 F3d 44 [2d Cir. 2003] [hypothetical situations that may not require the use of physical force to sustain a conviction for New York first-degree unlawful imprisonment are useful "only to a point" because the "inquiry under 16(b) is broader and more flexible, and involves asking whether the crime is one that by its nature involves a substantial risk that force may be used."]). For more information on *Jobson*, see *Backup Center REPORT*, Vol. XVIII, No. 3, May-June 2003, pp. 10-11. For more information on *Dickson*, see *Backup Center REPORT*, Vol. XVIII, No. 3, Oct-Nov-Dec 2003, pp. 11-12.

Although the BIA also held that Penal Law 125.20 is a divisible statute because a conviction under subsection (3) ("commits upon a female pregnant for more than twenty-four weeks an abortifacient act which causes her death . . .") may not inherently involve a risk that force will be used,

the BIA looked to the charging document to conclude that the defendant must have been convicted under subsection 1 or 2 because he was initially charged with second-degree murder under section 125.25(1) "because 'with intent to cause death of [his victim, he] caused [her] death . . . by stabbing her with a sharp instrument.'" The BIA noted that the offense of first-degree manslaughter under either subsection 1 or 2 is a lesser-included offense of intentional second-degree murder under New York law. The BIA did not analyze current subsection 4 of Penal Law 125.20 because it was added to the statute after the date of the defendant's conviction.

The issue of whether New York's first-degree manslaughter statute is a "crime of violence" is pending in the 2nd Circuit.

The bottom line: *Vargas-Sarmiento* is bad news for criminal defense attorneys and their noncitizen clients. Absent a contrary ruling by the 2nd Circuit, a conviction for New York first-degree manslaughter subsections 1 or 2 will now certainly be deemed a crime of violence aggravated felony if a prison sentence of at least one year is imposed, and a crime of domestic violence if the record of conviction establishes that it was committed against certain protected persons, triggering negative immigration consequences for the noncitizen client. Moreover, certain other New York convictions—for example, certain felony assault offenses—are now more likely to be deemed crimes of violence or crimes of domestic violence.

Vargas-Sarmiento addressed whether an offense may fall under the second prong of the "crime of violence" definition, which requires that an offense be a felony. The defense lawyer should bear in mind, however, that any felony conviction under New York law must be analyzed under both prongs of the "crime of violence" definition. In addition, any *misdemeanor* conviction under New York law must be analyzed under the first prong of the "crime of violence" definition, which does not require that the offense be a felony.

Practitioners should also be aware that even if a conviction may not trigger the crime of violence aggravated felony or the crime of domestic violence grounds of deportability, the same conviction might trigger another ground of removal, such as the "crime involving moral turpitude" ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony or a crime of domestic violence, practitioners are urged to call the IDP hotline at 212-898-4132 (Tues/Thur 1:30-4:30 p.m.).

Late-Breaking News:

Cert Granted on DWI with Bodily Injury as Crime of Violence

On Feb. 23, 2004, the Supreme Court granted *certiorari* in *Leocal v Ashcroft*, No. 03-583. At issue is whether a

Florida offense of driving while intoxicated with serious bodily injury is a crime of violence under 18 USC 16(a) and therefore an "aggravated felony" for immigration purposes. The Court's decision may affect many non-citizens convicted of other offenses that may arguably fall under the "crime of violence" definition. It may affect numerous noncitizens convicted of offenses that under current 2nd Circuit law would not be deemed crimes of violence. *See, eg, Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003) (CT simple assault statute identical in substance to NYPL 120.00 Assault 3d is not a crime of violence); *Jobson v Ashcroft*, 326 F3d 367 (NY recklessly causing death of another is not a crime of violence).

Defense counsel representing noncitizens charged with offenses that involve bodily injury should therefore consider both current law and the pending Supreme Court case in advising their clients on the immigration consequences of their pleas, and in structuring plea arrangements that may eliminate or reduce the likelihood of a "crime of violence" determination. Practitioners may call the IDP hotline for further information.

Defender News *(continued from page 9)*

NYSACDL President Ira London with the *Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner*.

Web Resources Sighted

The Backup Center uses, and helps members and other learn about and use, information available on the Internet. The "News Resources - New Web Sites" section of the "Defense News" area of the NYSDA web site (www.nysda.org) provides information on a variety of sites potentially helpful to defense practitioners. One such site is a new federal government site about consular notification, described below.

NYSDA's own site is not only a place to obtain new information but also the continuing repository of information helpful to defense lawyers and others. While most information is available to all, NYSDA members will find some special benefits, an example of which follows.

Empire Page Provides News

The *Empire Page*, at <http://www.empirepage.com>, is one of the premiere web sites for New York and national governmental news. *Empire* editors select links to the latest headline stories, columns and press releases from dozens of news sources. Thanks to the generous support of Peter G. Pollak, Editor in Chief of the *Empire Page* and CEO of Empire Information Services, NYSDA staff have benefited from free access to this invaluable news source. Furthermore, NYSDA members are eligible to receive a 17% discount, paying only \$32.95 per year rather than the

Updated Removal Defense Checklist in Criminal Charge Cases Available

The IDP continues to update the Removal Defense Checklist in Criminal Charge Cases. For access to this resource, updated to reflect legal developments through Dec. 15, 2003, visit the NYSDA website at: [http://www.nysda.org/NYSDA Resources/Immigrant Defense Project/03 RemovalDefenseChecklistDec2003.pdf](http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/03_RemovalDefenseChecklistDec2003.pdf).

Other new or updated resources that defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful are also available on NYSDA's website, and on The Defending Immigrants Partnership page of the website of the National Legal Aid and Defender Association. For access to this latter Internet resource, which includes practice tips, case blurbs, how-to question and answer exchanges, selected training resources and model pleadings, agency developments, and state and federal offenses immigration consequences charts, visit [http://www.nlada.org/Defender/Defender Immigrants](http://www.nlada.org/Defender/Defender_Immigrants). ☺

normal subscription price of \$39.95. The Association appreciates renewal of this benefit. NYSDA members who wish to take advantage of the offer should visit this special promotion site: https://www.empirepage.com/subscribe/subscription_form_defend.html, or click to the link appearing on the NYSDA home page.

New Web Site Set Up About Rights to Consular Notification and Access

Need to convince a court that the police should have contacted your noncitizen client's consulate? Or that the police had no excuse for not doing so? A new web site maintained by the Department of Justice contains information concerning foreign nationals in the US and their rights to consular assistance. Specifically, the site provides instructions and guidance relating to the arrest and detention of foreign nationals and to other situations such as the appointment of guardians for minors or incompetent adults who are foreign nationals. The instructions and guidance are for all federal, state, and local government officials, whether law enforcement, judicial, or other. Designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the US and that the US complies with its legal obligations to such governments, the web site is located at http://travel.state.gov/consul_notify.html.

Steinberg Becomes Justice

Long-time NYSDA Board Member David Steinberg was sworn in as Hyde Park Town Justice on Jan. 1, 2004.

(continued on page 47)